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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

DANA JAMAL POUGH,

Defendant and Appellant.

C063260

(Super. Ct. No.
SF101569A)

In September 2006, in San Joaquin Superior Court case No. SF101569A, defendant Dana Jamal Pough pled no contest to second degree burglary. He was granted probation and imposition of sentence was suspended for five years.

In December 2008 police officers Sandoval and Buhari saw defendant riding his bicycle without the required lights. Sandoval asked defendant if he could search him and defendant consented. In defendant's right front pants pocket was a glass pipe commonly used for smoking illegal narcotics. Defendant was arrested, and a search conducted incident to the arrest revealed credit cards and documents issued in other people's names. Defendant had not been given permission by those people to have the credit cards and records. Thus, in San Joaquin Superior

Court case No. SF110304A, defendant was charged with two counts of theft of an access card and one count of possession of drug paraphernalia.

As a result of the charges in case No. SF110304A, defendant was ordered to show cause why his 2006 grant of probation in case No. SF101569A should not be vacated and sentence imposed on that conviction. Defendant moved for a continuance of the probation violation case, alleging he might be prejudiced if he had to decide whether to testify to defend himself in the probation violation case prior to the trial in the theft case. The trial court denied the motion, finding there was no good cause established for the continuance.

Defendant moved to suppress the evidence seized in the search. The violation of probation and the motion to suppress were heard by the trial court at the same time. The trial court denied the motion to suppress. The trial court found defendant in violation of probation, finding there was probable cause that he violated his probation by committing credit card theft.¹ The trial court imposed the upper term of three years in state prison. The trial court noted defendant had carried out the offense with sophistication and had a prior record as an adult and a juvenile, this being his 10th felony conviction as an

¹ As to case No. SF110304A, the court also found reasonable and probable cause to hold defendant to answer on one count of credit card theft, one count of theft of access card information, and one count of possession of drug paraphernalia. The trial court dismissed the enhancements alleged in that case. That case is not before us on appeal.

adult. His prior performance on probation and parole had not been satisfactory. He was on parole when this offense was committed and had 14 violations of probation. Defendant was awarded 212 days' actual credit and 212 days' conduct credit pursuant to Penal Code section 4019, for a total of 424 days' presentence credit.²

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and asks this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief.

Defendant filed a supplemental brief raising two contentions, each without merit.

Defendant contends the trial court wrongfully sentenced him to the upper term. Defendant's criminal history justified the

² The California Supreme Court has granted review to resolve a split in authority over whether the January 2010 amendments to section 4019 apply to pending appeals. (*People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963 [giving retroactive effect to amendments]; accord, *People v. Pelayo* (2010) 184 Cal.App.4th 481, review granted July 21, 2010, S183552; *People v. Landon* (2010) 183 Cal.App.4th 1096, review granted June 23, 2010, S182808; *People v. House* (2010) 183 Cal.App.4th 1049, review granted June 23, 2010, S182813; contra, *People v. Hopkins* (2010) 184 Cal.App.4th 615, review granted July 28, 2010, S183724; *People v. Otubuah* (2010) 184 Cal.App.4th 422, review granted July 21, 2010, S184314; *People v. Rodriguez* (2010) 182 Cal.App.4th 535, review granted June 9, 2010, S181808.)

imposition of the upper-term sentence. (*People v. Towne* (2008) 44 Cal.4th 63, 76.)

Defendant also contends the trial court abused its discretion in denying his motion to continue the violation of probation hearing until after his felony trial. The record does not reveal an abuse of discretion. Had defendant chosen to testify at the probation revocation hearing, that testimony "and any evidence derived from such testimony, is inadmissible against the probationer during subsequent proceedings on the related criminal charges, save for purposes of impeachment or rebuttal" (*People v. Coleman* (1975) 13 Cal.3d 867, 889.) Because of this exclusionary rule, probation revocation hearings may be held "either before or after a probationer's trial on related charges" without a prejudicial impact on the defendant. (*Ibid.*)

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed.

RAYE, Acting P. J.

We concur:

ROBIE, J.

BUTZ, J.